1. FEDOR v. THE GRAND WALL, INC., ET AL., SC20180239

Motion for Summary Judgment

This action arises from a slip and fall incident on an exterior stairway which was allegedly caused by ice. Plaintiff Betsy Fedor's Second Amended Complaint ("SAC"), filed November 23, 2021, alleges four causes of action for negligence against defendants Melvin Laub; The Baker Trust; Coldwell Banker, McKinney and Associates; and Valley Maintenance, LLC ("Valley").[1] Pending is defendant Valley's motion for summary judgment.

1. Background

"[T]he pleadings set the boundaries of the issues to be resolved at summary judgment." (Oakland Raiders v. Nat. Football League (2005) 131 Cal.App.4th 621, 648.)

In this regard, the SAC alleges the following. Plaintiff asserts defendants owed her a legal duty to use reasonable care to keep the premises in a reasonably safe condition and to use reasonable care to discover, repair, or give adequate warning of anything that could reasonably be expected to harm others. Further, that defendants were responsible for the maintenance, use, control, management and/or supervision of the premises.

On or about January 6, 2017, plaintiff was lawfully on the premises owned, maintained and operated by defendant Melvin Laub located at 2494 Lake Tahoe Boulevard. That day, she walked onto a stairway located on the premises and fell due to the icy condition of the stairway. She alleges she fell due to a negligently maintained and unsafe walking surface located on the premises, which was created by defendant Laub's employees, agents, and/or independent contractors. She further alleges that defendants negligently failed to warn her that the stairway was unsafe and posed a danger to her and her ability to walk safely upon the stairway. As a result of defendants' negligent acts or omissions, she was hurt and injured in health, strength, and activity.

[1] One cause of action is asserted against each defendant.

2. Preliminary Matters

2.1 PLAINTIFF'S OBJECTION TO MOTION APPARENTLY DIRECTED AT ORIGINAL COMPLAINT

Plaintiff objects to Valley's motion because it is directed at the original Complaint and not the SAC. As stated earlier, the original Complaint was filed December 13, 2018, against The Grand Wall, Inc. A First Amended Complaint ("FAC") was filed on July 25, 2019, against defendants Melvin Laub and The Baker Trust. In January 2020, plaintiff filed a Doe amendment identifying Valley Maintenance as defendant Doe 1. Valley originally moved for summary judgment in October 2021. Then, plaintiff filed a SAC on November 23, 2021. Valley's motion was withdrawn after the SAC was filed, but was then renewed in November 2022.

It appears that Valley's reference to the original Complaint in its motion is simply a typographical error. Indeed, Valley's original motion for summary judgment was correctly directed against plaintiff's FAC. It is generally true that once an amended complaint is filed, it is error to grant a motion directed to a prior complaint. (State Compensation Ins. Fund v. Superior Court (2010) 184 Cal.App.4th 1124, 1131.) However, the court concludes that the SAC did not change the scope of issues Valley needs to address in its motion. Thus, no purpose would be served by requiring a new or renewed motion. Plaintiff's objection is overruled.

2.2 PARTIES' REQUESTS FOR JUDICIAL NOTICE

Plaintiff's request for judicial notice ("RJN") is granted. (Evid. Code, § 452(b), (h).)

Valley's RJN is granted. (Evid. Code, § 452(h).)

2.3 Evidentiary Objections

The parties' evidentiary objections are set forth within each party's response to the opposing party's separate statement of undisputed material facts, rather than in separate documents.

Plaintiff's Objection Numbers 2, 3, 10, 17, 19, 21, and 22 are overruled.

Valley's Objection Numbers 1–5, 8–11, 14, 17, 21–24, 26, 28–30, 32–42, 44–55, 57, 58, 60, 62, 64, and 66–74 are overruled.

3. Standard of Review

A defendant moving for summary judgment bears the burden of persuasion that one or more elements of the cause of action at issue cannot be established, or that there is a complete defense to the cause of action. (Aguilar v. Atl. Richfield Co. (2001) 25 Cal.4th 826, 850.) The moving party bears the initial burden of making a prima facie showing of the nonexistence of a triable issue of material fact, and only if the moving party carries the initial burden does the burden shift to the opposing party to produce a prima facie showing of the existence of a triable issue of material fact. (Ibid.)

"The court focuses on issue finding; it does not resolve issues of fact. The court seeks to find contradictions in the evidence, or inferences reasonably deducible from the evidence, which raise a triable issue of material fact." (Raven H. v. Gamette (2007) 157 Cal.App.4th 1017, 1024.) The evidence of the moving party is strictly construed and the evidence of the opposing party liberally construed. Doubts as to the propriety of granting the motion must be resolved in favor of the party opposing the motion. (Stationers Corp. v. Dun & Bradstreet, Inc. (1965) 62 Cal.2d 412, 417.)

4. Discussion

Valley moves for summary judgment on the grounds that (1) plaintiff cannot establish that Valley breached a duty of care, (2) the condition was an open and obvious risk, (3) Valley had no notice of the condition, and (4) Valley cannot be held liable pursuant to the "completion and acceptance" doctrine.

4.1 BREACH OF A DUTY OF CARE

Valley presented evidence that it was the contractor hired by Kelly Pelcher, the property manager of the subject premises, several years prior to the incident to perform ice melt/removal services. (Def. Separate Statement of Undisputed Material Facts ("UMF"), ¶ 15.) Valley's job was to remove ice and lay down ice melt on the stairs and

walkways, which had to be completed before 8:00 a.m., when the businesses would open. (UMF, ¶ 16.) Valley performed ice removal at nine different properties in South Lake Tahoe for co-defendant Coldwell Banker. (UMF, ¶ 18.) None of the properties that were serviced by Valley ever complained about the quality of its work. (UMF, ¶ 20.)

An invoice from Valley to Coldwell Banker indicates that Valley performed ice removal services on the stairways and walkways at the subject premises on the day of the incident, January 6, 2017. (UMF, ¶¶ 1, 19; Mot., Rivera Decl., ¶¶ 9, 10 & Exs. G, 23:2–24:1; H; I.) The incident with plaintiff occurred midday, several hours after Valley's deadline to complete its job. (UMF, ¶ 20.) The temperatures that day ranged from a low of about 17 degrees Fahrenheit to a high of 34 degrees. (UMF, ¶¶ 2, 3.) Prior to the incident, plaintiff had used the subject stairs hundreds of times and never sustained a slip or fall. (UMF, ¶ 5.) Plaintiff has never seen anyone else slip or fall on the stairs, and she has no information or knowledge about anyone else who suffered a slip or fall on the stairs, although a former co-worker told plaintiff that she and one other co-worker had slipped and fell at the premises. (UMF, ¶¶ 6, 7.)

The court finds this evidence is sufficient to produce a prima facie showing of the nonexistence of a material fact as to whether Valley breached a duty of care.

Plaintiff presented evidence that, on the day she fell, she did not see any ice melt on the stairway where she fell or anywhere else on the premises. (Pl. Separate Statement of Undisputed Material Facts ("PUMF"), ¶ 43.) Plaintiff knows what ice melt is. (AUMF, ¶ 44.) Kelly Pelcher, the property manager, inspected the subject property every 90 days or so. (PUMF, ¶ 46.) But, she did not go to the subject property at any time during the month of January 2017. (PUMF, ¶ 47.)

The court is not to weigh the relative strength of the parties' evidence or a person's credibility. Based upon plaintiff's evidence, the court finds that she has produced a prima facie showing of the existence of triable issues of material fact as to whether Valley was at the property on the morning of the incident and/or breached its duty of care.

4.2 WHETHER THE CONDITION OF THE STAIRWAY WAS OPEN AND OBVIOUS

Valley presented evidence that, following the incident, one of plaintiff's co-workers observed ice on the stairs where plaintiff allegedly fell. (UMF, ¶ 14.) However, plaintiff testified that the area where she slipped is obscured by the shadow of an overhang. (Opp., Schwartz Decl., Ex. A, 76:10–77:17.) The stairs appeared clear to plaintiff and almost wet. (Ibid.)

Based on the foregoing, the court finds there is a triable issue of material fact regarding whether the condition was open and obvious. Further, based on the limited evidence presented, the court cannot conclude that the icy condition was open and obvious as a matter of law.

4.3 WHETHER VALLEY HAD NOTICE OF THE PURPORTED CONDITION

With regard to Valley's notice of the condition, Valley did not make a prima facie showing of the nonexistence of a triable issue of fact. The only evidence cited by Valley in support of its contention that it did not have notice is the deposition testimony of Kelly Pelcher, property manager, that none of the nine properties serviced by Valley ever complained about the services performed by Valley. (UMF, ¶ 20.) But, a complaint about the quality of the job performed is not synonymous with notice of a specific condition of property on the day of the incident. Tragically, in August 2018, the owner of Valley suffered a debilitating stroke and can no longer walk or speak. (Mot., Rivera Decl., Ex. G, 22:22–25.) Unfortunately, he is not able to provide testimony about the day of the incident. (PUMF, ¶¶ 25–27.)

4.4 "COMPLETION AND ACCEPTANCE" DOCTRINE

Lastly, Valley moves for judgment on the basis of the "completion and acceptance" doctrine. Even assuming the doctrine is not limited to construction projects, Valley has not made a prima facie showing that its work was completed and accepted. As noted earlier, there is a triable issue of material fact as to whether Valley performed services at the subject property on the day of the incident.

For the foregoing reasons, Valley Maintenance's motion for summary judgment is denied.

TENTATIVE RULING # 1: VALLEY MAINTENANCE'S MOTION FOR SUMMARY JUDGMENT IS DENIED. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS v. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. PARTIES MAY APPEAR IN PERSON AT THE HEARING. IF ANY PARTY WISHES TO APPEAR REMOTELY THEY MUST APPEAR BY ZOOM.

2. KUSNIK v. GENERAL MOTORS LLC, 22CV1404

Motion to Compel Deposition of Defendant

At a Case Management Conference on January 24, 2023, the parties informed the court that a tentative settlement had been reached.

To date, there is no further status update from the parties about the settlement agreement, defendant did not file an opposition to the pending motion, and plaintiff has not withdrawn the motion.

TENTATIVE RULING # 2: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY, MARCH 24, 2023, IN DEPARTMENT FOUR.

3. IMPERIUM BLUE TAHOE HOLDINGS v. TAHOE CHATEAU LAND HOLDINGS, 22CV1204

(1) Demurrer

(2) Motion to Strike Portions of Complaint

This action involves two adjoining property owners and the written and recorded contracts governing their relationship. Plaintiff Imperium Blue Tahoe Holdings, LLC's First Amended Complaint ("FAC") asserts causes of action for (1) declaratory relief, (2) injunctive relief, (3) breach of contract, and (4) breach of the covenant of good faith and fair dealing. Pending is a demurrer to the FAC and a motion to strike portions of the FAC filed by defendants Tahoe Chateau Land Holdings, LLC, and Propriis LLC.

Demurrer

Defendants demur to plaintiff's 4th C/A for breach of the covenant of good faith and fair dealing. The demurrer is made on the grounds that there is no valid cause of action for tortious breach of the covenant of good faith and fair dealing given the circumstances of this action.

1. Standard of Review

"[A] demurrer challenges only the legal sufficiency of the complaint, not the truth or the accuracy of its factual allegations or the plaintiff's ability to prove those allegations." (Amarel v. Connell (1988) 202 Cal.App.3d 137, 140.) A demurrer is directed at the face of the complaint and to matters subject to judicial notice. (Code Civ. Proc., § 430.30(a).) All properly pleaded allegations of fact in the complaint are accepted as true, however improbable they may be, but not the contentions, deductions or conclusions of fact or law. (Blank v. Kirwan (1985) 39 Cal.3d 311, 318; Del E. Webb Corp. v. Structural Materials Co. (1981) 123 Cal.App.3d 593, 604.) A judge gives "the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (Blank, supra, 39 Cal.App.3d at p. 318.)

2. Discussion

"By now it is well established that a covenant of good faith and fair dealing is implicit in every contract. [Citations.] The essence of the implied covenant is that neither party to a contract will do anything to injure the right of the other to receive the benefits of the contract. [Fn.] [Citations.]" (Cates Construction, Inc. v. Talbot Partners (1999) 21 Cal.4th 28, 43–44.) "The implied covenant of good faith and fair dealing is a contractual relationship and does not give rise to an independent duty of care. Rather, ' "[t]he implied covenant of good faith and fair dealing is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated by the contract." ' [Citation.]" (Ragland v. U.S. Bank National Assn. (2012) 209 Cal.App.4th 182, 206.)

"At present, [the California Supreme Court] recognizes only one exception to that general rule: tort remedies are available for a breach of the covenant in cases involving insurance policies. [Citations.] In the insurance policy setting, an insured may recover damages not otherwise available in a contract action, such as emotional distress damages resulting from the insurer's bad faith conduct [citation] and punitive damages if there has been oppression, fraud, or malice by the insurer [citation]." (Cates, supra, 21 Cal.4th at pp. 43–44.) "[T]ort recovery in [the insurance policy] context is considered appropriate for a variety of policy reasons. Unlike most other contracts for goods or services, an insurance policy is characterized by elements of adhesion, public interest and fiduciary responsibility. [Citations.] In general, insurance policies are not purchased for profit or advantage; rather, they are obtained for peace of mind and security in the event of an accident or other catastrophe. [Citations.] Moreover, an insured faces a unique 'economic dilemma' when its insurer breaches the implied covenant of good faith and fair dealing. [Citation.] Unlike other parties in contract who typically may seek recourse in the marketplace in the event of a breach, an insured will not be able to find another insurance company willing to pay for a loss already incurred." (Cates, supra, 21 Cal.4th at p. 44.)

The court concludes that the contract relationship in this case is not sufficiently similar to that of an insured and an insurer to warrant the extension of plaintiff's proposed tort remedies to alleged breaches of the covenant concerning the Chateau Shared Improvement Maintenance and Easement Agreement ("M&E Agreement") and the Parking and Access Agreement ("Parking Agreement"). Accordingly, the demurrer is sustained. Plaintiff may amend its complaint to assert a breach of the covenant in conjunction with its 3rd C/A for breach of contract. In addition, for purposes of clean-up, when plaintiff amends its complaint the court suggests that plaintiff separate into standalone breach of contract causes of action alleged breaches of the M&E Agreement from alleged breaches of the Parking Agreement.

Motion to Strike Portions of the FAC

Lastly, defendants move to strike certain paragraphs from all four of plaintiff's causes of action, plaintiff's proposed tort damages, and an incorrect document reference.

1. Standard of Review

A motion to strike is generally used to address defects appearing on the face of a pleading that are not subject to demurrer. (Pierson v. Sharp Memorial Hospital (1989) 216 Cal.App.3d 340, 342.) Further, "[t]he court may, upon a motion [to strike] …, or at any time in its discretion … [¶] … [s]trike out any irrelevant, false, or improper matter inserted in any pleading." (Code Civ. Proc., § 436(a).) Like a demurrer, the grounds for a motion to strike must appear on the face of the pleading or from any matter which the court is required to take judicial notice. (Code Civ. Proc., § 437(a).) On a motion to strike, the trial court must read the complaint as a whole, considering all parts in their context, and must assume the truth of all well-pleaded allegations. (Courtesy Ambulance Service v. Superior Court (1992) 8 Cal.App.4th 1504, 1519.)

2. Discussion

Several of the grounds for defendants' motion are directed at allegations of the FAC that defendants contend are contrary to the terms of the parties' M&E Agreement, which agreement is attached to the FAC.

"Where written documents are the foundation of an action and are attached to the complaint and incorporated therein by reference, they become a part of the complaint" and may be considered in deciding a motion to strike. (City of Pomona v. Superior Court (2001) 89 Cal.App.4th 793, 800.) "[F]acts appearing in exhibits attached to the complaint will also be accepted as true and, if contrary to the allegations in the pleading, will be given precedence." (Dodd v. Citizens Bank of Costa Mesa (1990) 222 Cal.App.3d 1624, 1627.)

In this regard, the court finds that plaintiff's allegations in the FAC concerning "conditions precedent" are contrary to the M&E Agreement. Thus, the language of the M&E Agreement will be given precedence. The portions of the M&E Agreement cited by plaintiff do not set forth conditions precedent to the commencement of construction or require plaintiff's receipt of "deliverables" from defendants in order "to enable construction above [plaintiff's] property to proceed." (FAC, ¶ 13.)

Accordingly, the motion to strike as to paragraphs 16 and 17 in their entirety and a portion of paragraph 19 of the 1st C/A is granted with leave to amend. Further, because the 2nd C/A and the 3rd C/A also rely upon the purported "conditions precedent" and receipt of "deliverables" that are not set forth in the M&E Agreement, the motion is also granted with leave to amend as to paragraphs 21 and 22 of the 2nd C/A and paragraph 30 of the 3rd C/A.

The motion as to paragraphs 31, 34, and 35 of the 3rd C/A is denied.

The motion as to paragraph 32 of the 3rd C/A is granted with leave to amend the citation to the incorrect agreement.

Lastly, defendants move to strike plaintiff's request for punitive damages in paragraph 44 of the 4th C/A and paragraph 6 of the Prayer for Relief.

Since the demurrer to the 4th C/A is being sustained, there is no cause of action that would sustain a prayer for punitive damages. As such, the motion as to paragraph 6 of the Prayer for Relief is granted. Leave to amend the request for punitive damages is denied unless plaintiff can adequately explain how the FAC can be amended to sufficiently plead conduct that might support a request for punitive damages based upon malice, or oppression, or fraud. (See Roman v. County of Los Angeles (2000) 85 Cal.App.4th 316, 322.)

TENTATIVE RULING # 3: DEFENDANTS' DEMURRER TO THE FIRST AMENDED COMPLAINT IS SUSTAINED WITH LEAVE TO AMEND. DEFENDANTS' MOTION TO STRIKE PORTIONS OF THE FIRST AMENDED COMPLAINT IS GRANTED IN PART WITH LEAVE TO AMEND AND DENIED IN PART. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS v. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. PARTIES MAY APPEAR IN PERSON AT THE HEARING. IF ANY PARTY WISHES TO APPEAR REMOTELY THEY MUST APPEAR BY ZOOM.

4. DEGOLISH v. PLACER TITLE CO., ET AL., 22CV1845

Application to Appear Pro Hac Vice for Plaintiff

There is no notice of hearing or proof of service of the notice in the court's file establishing that counsel for all parties who have appeared in the action and the State Bar were served with the notice of hearing and a copy of the application. (Cal. Rules of Ct., rule 9.40(c)(1); Code Civ. Proc., §§ 1005, 1013a.)

TENTATIVE RULING # 4: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY, MARCH 24, 2023, IN DEPARTMENT FOUR.

5. GENASCI v. DENZLER, ET AL., SC20210094

Motion for Substitution of Party by Successor in Interest of Plaintiff

TENTATIVE RULING # 5: MOTION FOR SUBSTITUTION OF PARTY IS GRANTED. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS v. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. PARTIES MAY APPEAR IN PERSON AT THE HEARING. IF ANY PARTY WISHES TO APPEAR REMOTELY THEY MUST APPEAR BY ZOOM.

6. PERFECT UNION SLT, LLC v. CITY OF SOUTH LAKE TAHOE, SC20210172

Motion for Summary Judgment

On the court's own motion, matter is continued to April 14, 2023. The court apologizes for any inconvenience to the parties.

TENTATIVE RULING # 6: MATTER IS CONTINUED TO 1:30 P.M., FRIDAY, APRIL 14, 2023, IN DEPARTMENT FOUR.